

BILLS COMMITTEE ON LAND TITLES BILL

Wrongful Registration of Cautions Supplementary Paper

Purpose

This paper provides further information on the subject of wrongful registration of cautions and should be read in conjunction with the paper “Wrongful Registration of Cautions” [CB(1)149/03-04(03)].

Background

2. At the 17th Bills Committee meeting held on 28 October 2003, Members asked the Administration to consider the following –

- (a) how Clause 73 of the Bill compared with the common law position on claims for damages in tort and whether Clause 73 as presently drafted was sufficiently clear to reflect the policy intent;
- (b) the consistency between the existing deeds registration system (DRS) and the new land title registration system (LTRS) in respect of wrongful registrations; and
- (c) the need to ensure a correct Chinese version of the terms “wrongful” and “wrongfully”.

Common law position and policy intent

3. As explained in CB(1)149/03-04(03), it is more probable than not that at present damages may be awarded for a wrongful registration of *lis pendens* if the facts are properly pleaded to establish a separate cause of action. We have nonetheless further researched the case law in view of Members’ concern¹. Our conclusion is that the case law authorities do tend to show that a claim for damages for a ‘wrongful and injurious’ registration of instrument resulting in loss may be actionable. However, ‘injurious’ in

¹ Including but not limited to the following cases: *Chan Yu Leung V Wong Shui Fong* [1998] 4 HKC 474 (Court of Appeal); *Gibb v Pike* (1842) 9 M & W 351 [Lord Abinger]; *Gregory v Portsmouth City Council* (2000) 1 All ER 560 (House of Lords); and *Quartz Hill Consolidated Gold Mining Co. v Eyre* (1883) 11 Q.B.D. 674 (Court of Appeal).

this sense means without reasonable and probable cause, and with malice. Thus a claimant who makes a common law claim in tort for wrongful registration will probably be required to prove an element of 'malice'.

4. Under Clause 73, 'malice' does not have to be proved. The reasoning behind this is that proof of 'malice' requires a proof of the intention of the wrongdoer, which is difficult to obtain. Requiring such proof is likely to undermine the intention of providing a sufficient deterrent to wrongful registration lest cautions be abused. Instead, Clause 73 uses the 'without a reasonable cause' test. It should provide a more effective deterrent effect while still safeguarding the cautioner's interest by availing him of a fairly straightforward defence against a charge that he has acted 'wrongfully'.

5. We believe that given the need to deter wrongful registrations and provide a clear statutory basis for a claim for damages arising out of such a registration, the slight departure from the common law position in Clause 73 is justified. The exclusion of the 'malice' test removes the difficulty in proof of a subjective element which could much reduce the deterrent effect. Clause 73 as drafted, therefore, is sufficiently clear to reflect the policy intent.

Harmonization of future claims under DRS and LTRS

6. The Administration agrees that claims for wrongful registrations under the DRS and the LTRS ought to be in line with each other. Subject to agreement on Clause 73, we will propose suitable consequential amendments to the Land Registration Ordinance for the purpose.

Chinese version

7. The Administration agrees that the present version should be amended. We will propose suitable Committee Stage Amendments for the purpose in due course.

November 2003
Housing, Planning and Lands Bureau